No. 3580

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error, Petitioner,

vs.

MIKE KOSO,

Defendant in Error.

PETITION FOR REHEARING
and
BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

Filed this.....day of May, 1921.

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Clerk U. S. Circuit Court of Appeals.

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UNITED VERDE EXTENSION MINING COMPANY, a corporation,

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vs.

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Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

Comes now the plaintiff in error in the above cause and respectfully petitions this honorable Court for a rehearing of the cause. This Court did on May 2, 1921, affirm the judgment of the United States District Court of Arizona in favor of the defendant in error, and filed opinion on said date. This petitioner states as grounds for this application the following:

I.

The Court, by its opinion and page 6 thereof, indicates that the situation and facts in reference to tes-

timony by Koso relating to his injuries have been confused, and the Court has evidently assumed by its premise and statement, "In view of the fact that there was evidence tending to show that the injuries which the plaintiff said he received were permanent in character," that the plaintiff Koso himself, or someone for him, testified that he received or suffered from an injury to his hand or hernia as a result of the accident, or at all, whereas the testimony shows that he did not so plead and did not so state in his personal testimony, or did anyone for him, but the physician testified he found this condition on an examination over two years after the accident, he did not testify and there was no testimony that these conditions of hand and hernia were a proximate, or any, result of the accident, the injuries about which Koso testified having been found by the physician to be repaired by nature and united; and this Court apparently omitted from its consideration the grounds stated in Specification of Error X and in the authorities cited by plaintiff in error, and relied upon as a principal point, that evidence tending to prove permanency must be evidence to a reasonable certainty; and the omission to consider or grasp the said point is further shown by the fact that the Court has cited in support of its assumption that the evidence tended to show permanency, Tweedy v. Inland Brewing Co., wherein the case was remanded on the ground that injuries of a similar kind, even

when a doctor testified specifically the condition would become permanent, could not be considered permanent.

II.

The Court in rendering its decision upon the instruction in regard to elements of permanent damages (Specification of Error IX), on page 8 of the opinion, has apparently omitted to notice and to consider (1) that the said instruction is quoted substantially in Inspiration Consolidated Copper Company v. Lindley, 20 Ariz. 101, where it was specifically applied to **permanent** disability as follows: "No fixed rule exists for estimating the damages to be recovered by one who is permanently disabled from laboring through the negligence of another; the most that can be done is to instruct the jury in general terms to award a fair and reasonable compensation, taking into consideration what plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable." (2) That this was the specific instruction on elements of damage "if you find for the plaintiff," although the Court charged the jury it was to determine whether the injuries were permanent or temporary, and it might find the one or the other; and (3) that courts construe exceptions with reference to issues and evident understanding of court and counsel at the time.

III.

The decision of the Court in reference to Specifi-

cation of Error I, on pages 8 and 9 of the opinion, is based upon the premise that the lower Court made no ruling in denial of the motion for cost security until August, 1920, or after the trial. This statement is founded upon a typographical error in the Transcript of Record, page 17, which was printed under the supervision and control of the Courts and this petitioner, under rule of court, had no control over or part in the said printing. The said error was brought to attention of this petitioner only when the brief of the defendant in error was served on February 9, 1921, and immediately this petitioner, by its attorneys, communicated with the Clerk of the United States District Court for Arizona, at Phoenix, Arizona, as follows:

Re: Koso v. United Verde Extension Mining Company.

"On page 17 of the transcript of record in the above case, as said transcript has been made up and printed by the Clerk of the Circuit Court of Appeals, there is a typographical error. At the bottom of the page the following notation is made: 'Minutes of Court—August 4, 1920—Order Overruling Motion for Security for Costs.' This order was, as your records will show, made on August 4, 1919. Mr. Struckmeyer, in his brief, however, has taken the date 1920 as correct and argues that the order was not made until after the trial, which occurred in March, 1920. In view of this situation, and in order to notify the Clerk of the Circuit Court of Appeals, we would ask that you certify to him that the records of your

Court show that the order was made on August 4, 1919, and that the error in the printed transcript is typographical and one for which neither party is responsible since the record was made up and printed by you and the Clerk of the Circuit Court of Appeals. This case comes on for hearing on February 14, and we would therefore ask that you send this certificate immediately so that the Circuit Court may have the necessary official notice."

And the following reply was received dated at Phoenix, Arizona, February 12, 1921:

"Re: Koso vs. United Verde Extension Mining Company No. L-45 (Prescott).

"Acknowledge receipt of yours of the 9th instant and same was not received until this date. However, I have prepared a certified copy of the Minute Entry of August 4, 1919, and forwarded same by special delivery to the Clerk of the Circuit Court of Appeals at San Francisco, Calif., to be used on the hearing of the above entitled cause. Yours truly,

"C. R. McFALL, Clerk,

"By Clyde C. Downing, Chief Deputy Clerk."

This petitioner is further willing and offers, if deemed by the Court to be its duty or of aid, to procure such additional proof as may be necessary to enable this Court to order said transcript corrected to show the true state of the record, and respectfully submits that this ground should be reconsidered on the basis of the true fact and record.

IV.

The Court has misunderstood the argument of

plaintiff in error upon, and the grounds of, Specification of Error II, discussed upon pages 9 and 10 of the opinion; the point of plaintiff in error being that under Arizona law requiring that the workman shall make his election of remedies **by the institution of suit,** this plaintiff should have been held to have elected such action as his facts fell within and should not have been permitted to make an election after two years had elapsed; and the Court has seemingly confined the scope of the objection and exception to the ruling of the lower Court to the demurrer to the first cause of action, although, it is submitted, it is a reasonable reading of the Minute Order (Tr. 18 and 19) that said objection and exception covered and was intended to cover both the points mentioned in said Minute Order, and was directed to the order of the Court which permitted the plaintiff to elect.

FAVOUR & CORNICK,

Attorneys for Petitioner, United Verde Extension Mining Company.

This is to certify that the undersigned are counsel for the plaintiff in error in the above cause; that in their judgment the above petition for rehearing is well founded; that the statements made in respect to the error in the record are, based upon the information furnished by the Clerk of the United States District Court for Arizona, true and correct, and this petition is not interposed for delay, but in order that correction may be made in the erroneous premise of

fact and the opinion predicated thereon; and that the Court may have brought to its attention apparent misunderstanding of facts and points essential to the determination of the cause.

A. H. FAVOUR,
A. G. BAKER.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

Argument on Ground I.

The first ground is that the opinion (page 6) that it was within the sound discretion of the lower Court to permit the introduction of mortality tables is predicated by the Court upon the statement "there was evidence tending to show that the injuries which plaintiff said he received were permanent in character." The only injuries which Koso said he received were to his back, shoulder-blade and toe (Tr. 35); he did not testify he had any injury to his hand. His doctor did not testify that the loss of power of the hand was due or could have been due to any of the injuries Koso said he received in the accident. There is the same lack of connecting evidence in the case of the hernia. The doctor testified that the injuries which Koso said he had received, that is, to his shoulder-blade and back, had been "repaired by nature and united." It is submitted there was no reason for defendant to object to such testimony, which defendant considered under the literal and clear wording to tend to prove only a temporary injury at the most, which had been healed. The injuries Koso "said he received" were admittedly repaired and united and there was no intimation in the testimony of the doctor that they were not fully

healed, much less any testimony of permanency. The point on which the plaintiff in error cited numerous cases, stated and raised by Specifications of Error 5 and 10, and emphasized in its Brief as being a prime contention, is the lack of that kind of substantial evidence and evidence to a reasonable certainty of permanent injury which is required by the law before mortality tables are admissible or recovery can be permitted for permanent injury. The petitioner believes it is apparent from the opinion that this Court, while recognizing that evidence of permanency is a necessary condition prerequisite, proceeded upon the assumption, which is not the fact, that the injuries which Koso said he received, were the same conditions which his doctor said he found on an examination two years afterward, and on that assumption came to the conclusion there was evidence tending to show permanent injury; and it is manifest that the decisions cited by plaintiff in error concerning the necessity for substantial evidence in order to constitute any evidence of permanency, were not brought to the attention and were not in consideration of the Court in rendering its decision, and the citation by the Court of the case of Tweedy vs. Inland Brewing Company shows further that this point was overlooked and not considered and weighed by the Court, since the higher Court held in that case that there was not evidence justifying any theory of permanent injury, directly in point with this plaintiff in error.

The Federal appellate courts review the evidence on error. A motion for directed verdict raises the question. There was such a motion and exception in this cause and Specification of Error X also states the issue.

Pacific Casualty Co. vs. Whiteway (CCA 9th) 210 Fed. 782:

> A verdict is not subject to review unless there is an absence of substantial evidence; a **request for peremptory** instruction and exception.

Jones Bank vs. Yates, U. S. 60 L. Ed. 788:

> The Court reviewing on error will inquire whether there is substantial evidence to support the findings.

Oregon-Wash. R. R. vs. Branham (CCA 9th) 259 Fed. 555:

Vol. 3 Corpus Juris, 1374:

> Assignment of error in refusing to direct verdict raises the legal question whether there is any evidence legally tending to sustain the verdict.

Jenkins vs. Skelton (Ariz.) 192 Pac. 249.

It is submitted that the cases show the law to be that evidence of permanent injury in order to be any legal evidence must be substantial and to a reasonable certainty, and clearly such substantial evidence is meant in the decisions cited by this Court at

the bottom of page 7 of its opinion, which cases hold that mortality tables are admissible in cases of permanent injury, which is an undisputed principle of law, but this statement must be held to mean that there must be that substantial evidence required by the decided cases, and that evidence of permanent injury is a condition precedent to admissibility.

Also the evidence of permanency was clear, convincing and apparent in the following cases decided by this Court:

Northern Pacific Co. vs. Chervenak (CCA 9th), 203 Fed. 884;

Colussa vs. Parrott (9th CCA), 162 Fed. 276.

And in the following cases cited in Brief and Abstract of Plaintiff in Error the rule is applied, and judgments reversed where evidence of permanent injury was not substantial and to a reasonable certainty:

McGregor vs. R. I. Co., 60 Atl. 761;
Mott vs. Detroit Co., 79 N. W. 3;
W. U. Co. vs. Morris (CCA), 83 Fed. 992;
Leach vs. Detroit Co., 84 N. W. 316;
Tenney vs. Rapid City, 96 N. W. 96;
Foster vs. Village Bellaire, 86 N. W. 383;
Thayer vs. Denver Co., 154 Pac. 691;
Hardy vs. Milwaukee Co., 61 N. W. 771;
Snyder vs. Great Northern, 162 Pac. 703;

White vs. Milwaukee Co., 21 N. W. 524;

McBride vs. St. Paul, 75 N. W. 231;

Meeter vs. Manhattan Co., 75 N. Y. S. 561;

Filer vs. New York Central, 49 N. Y. 43;

Ingebretson vs. Minn. Co. (Iowa), 155 N. W. 327.

Block vs. Milwaukee Co., 46 Am. St. Rep. 849.

Argument on Ground II.

The instruction quoted in Specification of Error IX, directed the jury, if they found for plaintiff, to consider elements of permanent damage. The instruction is evidently taken from the Lindley case, where it was specifically applied to permanent injuries. This was a specific instruction; the case cited in this Court's opinion (Vicksburg vs. Meridian Co.), considers the effect of incidental observations of the judge and states that the impression made by peremptory instruction would not be removed by such observations.

Under this specific charge the jury was authorized and required to consider those elements even if they found temporary injury. The exception to the presuming of permanency (Tr. 56), in view of the understanding of the issue as shown by the additional remarks of the judge, would, it is submitted, extend to this instruction under the authorities following:

Winfrey vs. M. K. & T. Co. (CCA), 194 Fed. 808:

Where an exception makes general reference to a topic discussed in a charge and the topic constitutes a definite part of the charge clearly distinguished from other parts, the exception is sufficient for review.

Harkins vs. Brown (CCA), 108 Fed. 576:

While assignments of error relating to rulings on the admission of evidence cannot be broader than the exceptions taken on trial, yet such exceptions must be construed with reference to the issues before the jury and the evident understanding of court and counsel at the time they were made as to their grounds and scope.

Pritchett vs. Sullivan (CCA), 182 Fed. 480:

Where an instruction states a specific proposition of law on a particular subject, obviously with deliberation and not inadvertently, a general exception is sufficient to challenge the correctness of such proposition.

Vol. 3 Corpus Juris, 1342:

In a number of jurisdictions either by reason of rule of court or because the court has discretion, the appellate court will notice plain errors. (U. S. Cases.)

Argument on Ground III.

This point respecting error in date needs no enlargement, except to state that it is often the reasonable and convenient practice of the District Court

having several divisions with one judge to make its rulings on preliminary motions without notice or presence of counsel, preserving exceptions for the parties, and plaintiff's counsel may have received no notice of this ruling. Further evidence of the error in date is shown by the fact that the said Minute Order comes at a place in the Transcript, arranged by the Clerk, which indicates it was not made in August, 1920.

Argument on Ground IV.

The Court has followed the interpretation given in the Brief of Defendant in Error to the words in Brief of Plaintiff in Error (page 17): "The Court erred in overruling or failing to act upon the demurrer." This was simply an alternative wording and was so stated for the reason that when the demurrer to the whole complaint was being presented the plaintiff stated he elected to proceed under Count I and the Court immediately, without consent of defendant, made the order that plaintiff so elected, and then overruled defendant's demurrer to Count I. The defendant excepted to the whole ruling. This petitioner submits that the record reasonably shows that the exception was to the whole proceeding in which the court ordered the election and overruled the demurrer to Count I. The argument in our Brief shows this was the point raised and no complaint was made of the failure to act except as the order of election was substituted by the Court as a ruling on

the demurrer. The Court has seemingly been misled into an incorrect understanding of the ground for this assignment and the argument thereon, and the plaintiff in error has thereby been placed in the position of contending for a point without merit, and for which it does not contend, to wit, that it has asked the Court to "hold that the limitation of the statute has been rendered ineffectual." Our point, as stated on page 18 of the Brief, is that the law of Arizona, Sec. 3176, provides that "any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively"; that a workman has two years to bring suit and make this election; that the only election this plaintiff made within two years was by the institution of his suit since he made no other election; that it was plaintiff's duty to make his election before the two years' limitation and not the Court's duty to order it to be made; that after the two years the Court should not have permitted an election by plaintiff and had no power to do so under the law, but should have held the plaintiff to such cause of action as the facts in his whole complaint brought him within, plaintiff having pleaded facts constituting negligence of defendant; that by allowing an election after two years the statute requiring election by institution of suit and the two-year limitation of the Employers' Liability Law is rendered ineffective, since by pleading two inconsistent Counts the election of remedies

could be postponed by a workman at least for three years under the Arizona law providing that summons may be issued and served any time within a year after institution of action.

Behringer vs. Inspiration Co., 17 Ariz. 232, at page 236:

The Court says: "His personal representative is then relegated to an action . . . . . under the so-called Lord Campbell's Act, or under the Employers' Liability Act . . . . . according as his facts fall within the one or the other."

Jerome Verde Co. vs. Riley (Ariz), 192 Pac. 429:

The same facts cannot establish negligence and mere accident. The facts establish either negligence as known to the law or they establish a condition free from negligence.

Calumet & Arizona Co. vs. Chambers, 20 Ariz., at page 62:

The Court states: "Of course, justice and fairness require that the plaintiff be held to bring himself within the conditions prescribed by the law relied upon, and confine his right to recovery to the law he relies upon in his complaint. If he expressly alleges, as this plaintiff has done, that he relies upon the Employers' Liability Law for a recovery, he cannot thereafter take the **inconsistent position** that the facts stated in his complaint, though insufficient to constitute a cause of action under such law, yet they are sufficient to constitute a cause of action, for instance, for negligence."

Respectfully submitted,

FAVOUR & CORNICK,

Attorneys for Petitioner.